1997

Catherine Brown v. Chris Glover, dba Chick-Fil-A of Fashion Place, Hahn Property Management Corporation, a California corporation dba Hahn Company : Brief of Appellant

Utah Court of Appeals

John R. Lund; Snow, Christensen & Martineau; Attorneys for Appellee.
Nancy A. Mismash; Robert J. Debry & Associates; Attorneys for Appellant.

ORIGINAL

IN THE UTAH COURT OF APPEALS

ATHERINE BROWN, Plaintiff/Appellant, HRIS GLOVER dba CHICK-FIL-A F FASHION PLACE, HAHN ROPERTY MANAGEMENT ORPORATION, a California rporation dba HAHN COMPANY, Defendants/Respondents.	Appeal No. 970694-CA Priority No. 15

BRIEF OF APPELLANT

APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE WILLIAM B. BOHLING PRESIDING

NANCY A. MISMASH - 6615
ROBERT J. DEBRY & ASSOCIATES
3575 South Market Street, Suite 206
Salt Lake City, UT 84107
Telephone: (801) 262-8915
Attorneys for Appellant

OHN R. LUND
NOW, CHRISTENSEN & MARTINEAU
1 Exchange Place, Eleventh Floor
O. Box 45000
alt Lake City, UT 84145
elephone: (801) 521-9000
ttorney for Respondents

IN THE UTAH COURT OF APPEALS

CATHERINE BROWN, Plaintiff/Appellant, v. CHRIS GLOVER dba CHICK-FIL-A OF FASHION PLACE, HAHN PROPERTY MANAGEMENT CORPORATION, a California corporation dba HAHN COMPANY, Defendants/Respondents.	Appeal No. 970694-CA Priority No. 15

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3575 South Market Street, Suite 206
Salt Lake City, UT 84107
Telephone: (801) 262-8915
Attorneys for Appellant

JOHN R. LUND
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, UT 84145
Telephone: (801) 521-9000
Attorney for Respondents

I.

PARTIES TO THIS PROCEEDING

The parties to this proceeding are identified in the caption of the case. Appellant Catherine Brown was the Plaintiff below. Respondents Chris Glover dba CHICK-FIL-A of Fashion Place and Hahn Property Management Corporation, a California corporation dba Hahn Company were the Defendants.

II.

TABLE OF CONTENTS

III.

TABLE OF AUTHORITIES

Cases: **Page**

Other Authorities:

IV.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Annotated §§ 78-2-2(3)(k) and 78-29-3(2)(j). The Order granting summary judgment was entered on July 23, 1997 (R.449-451). Appellant's timely notice of appeal was filed on August 6, 1997 (R.455-456).

V.

ISSUES PRESENTED AND STANDARD OF REVIEW

The issues presented for review are:

1. Whether the trial court abused its discretion by denying Plaintiff's Motion to Continue Trial and Vacate Scheduling Order given the exigent circumstances (R.449-451; A.1-3).
2. Whether the trial court abused its discretion by not granting Plaintiff's Motion to Compel, given that Defendant had previously agreed to provide discovery responses, prior to ruling on the Motion for Summary Judgment (R.449-451; A.1-3).
3. Whether the trial court abused its discretion by ruling that Plaintiff's discovery requests could have been done well before the Summary

Judgment Motion was filed, given the exigent circumstances (R.449-451; A.1-3).

4. Whether the trial court abused its discretion in granting Summary Judgment as a sanction against Plaintiff when it was Defendant that failed to respond to discovery (R.449-451; A.1-3).

5. Whether the trial court abuse its discretion by not granting Plaintiff's Motion for Continuance [of the hearing on Defendant's Motion for Summary Judgement] Under Utah Rules of Civil Procedure 56(f) (R.449-451; A.1-3).

6. Whether the trial court committed reversible error by granting Defendant's Motion for Summary Judgment (R.449-451; A.1-3).

As to issues number 1 - 5, the applicable standard of appellate review is abusive discretion in the trial court's decision to deny the Motion to Continue, Motion to Compel and Rule 56(f) motion. *Holbrook v. Master Protection Corp.*, 883 P.2d 295, 298 (Utah App. 1994); *Crossland Savings v. Hatch*, 877 P.2d 1241, 1242 (Utah 1994).

As to issue no. 6, the applicable standard of appellate review is a review for correctness, with no deference to the conclusions of the trial court. See: *Anderson v. Dean Witter Reynolds, Inc.*, 920 P.2d 575, 577-78 (Utah App. 1996), cert. denied, 929

P.2d 350 (Utah 1996); *Mitchell v. Rice*, 885 P.2d 820, 821 (Utah App. 1994); *Schurtz v. BMW of North America, Inc.*, 814 P.2d 1108, 1111-12 (Utah 1991); and Utah R. Civ. P. 56(c).

VI.

DETERMINATIVE STATUTES

Rules 40(b) and 56(f), Utah Rules of Civil Procedure, are determinative in this case. Rule 40(b) provides:

> **ASSIGNMENT OF CASES FOR TRIAL; CONTINUANCE**
>
> (b) *Postponement of the trial.* Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it.

Rule 56(f) provides:

> **SUMMARY JUDGMENT**
>
> (f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

VII.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, Disposition of the Lower Court.

This case involves a slip and fall accident which occurred on January 18, 1994 at Fashion Place Mall near the CHICK-FIL-A restaurant. Plaintiff was a Dillard's employee that had been visiting another shop during her lunch hour. On her way back from lunch, Plaintiff walked down the mall concourse where the CHICK-FIL-A restaurant was located. An unidentified CHICK-FIL-A employee was in the mall concourse offering mall patrons samples of greasy chicken on a tooth-pick. As she walked past the CHICK-FIL-A restaurant, Plaintiff slipped and fell on a greasy piece of chicken. Plaintiff sustained serious injuries to her back from the slip and fall. (Complaint and Jury Demand, R.2-3; Amended Complaint and Jury Demand, R.12-13; Memorandum in Support of Defendant's Motion for Summary Judgment, R.177-178).

On May 5, 1997 the Court heard oral argument on Plaintiff's Motion to Continue Trial and Vacate Scheduling Order, Motion to Compel, Rule 56(f) Motion to Stay Decision and Defendant's Motion for Summary Judgment. At the conclusion, the Court denied Plaintiff's Motion to Stay, granted Defendant's Motion for Summary Judgment, and found that Plaintiff's Motion to Continue Trial and Vacate the Scheduling Order was

moot. No decision was made on Plaintiff's Motion to Compel.

B. Statement of the Facts Relevant to the Issues Presented for Review.

Defendant CHICK-FIL-A was served with a Complaint and Plaintiff's First Set of Interrogatories and Request for Production of Documents on October 19, 1995 (Certificate of Service, R.19-21). The Interrogatories consisted of five (5) questions seeking the name, address, telephone number, and identity of CHICK-FIL-A employees, specifically the employee distributing samples in the mall on January 18, 1994. Defendant agreed to provide discovery responses. On April 3, 1996 Plaintiff's attorney again requested the names of those individuals working at the CHICK-FIL-A restaurant on January 18, 1994 (Memo. in Support of Motion to Compel, Ex. C, R.244). In June 1996, Plaintiff's case was transferred within the DeBry firm to Mr. Wells (R.88). On December 9, 1996, Ed Wells withdrew as Plaintiff's counsel of record, and was subsequently disbarred (R.110). On December 3, 1996, Plaintiff's subsequent attorney again advised Defendant's attorney that Defendant's answers were late (Memo. in Support of Motion to Compel, Ex. D, R.246). Defendant did not answer Plaintiff's First Set of Interrogatories until March 24, 1997 (Defendant Chris Glover dba CHICK-FIL-A's Answers to Plaintiff's First Set of Interrogatories, R.168-171). The answers filed were incomplete and non-responsive. On March 31, 1997 Defendant filed its Motion and

Memorandum in Support of Motion for Summary Judgment (R.176-219). On April 14, 1997 Plaintiff filed her Motion and Memorandum to Compel Defendant's Answers to Plaintiff's First Set of Interrogatories; Motion and Memorandum to Continue Trial and to Vacate Scheduling Order (R.232-252; 301-324; 325-327); and noticed up 27 depositions of the employees identified in Defendant's answers to interrogatories (R.220-227; 232-298) On April 21, 1997 Plaintiff filed Plaintiff's Rule 56(f) Motion to Stay Decision on Defendant's Motion for Summary Judgment Until Additional Discovery is Complete; Affidavit of Nancy A. Mismash; and Memorandum in Opposition to Defendant's Motion for Summary Judgment and Memorandum in Support of Plaintiff's Motion for Continuance Under Rule 56(f) (R.330-331; 332-390; 391-393).

Plaintiff moved for a continuance of the trial date because Defendant failed to provide the discovery as agreed and because of exigent circumstances (R.304-307). Specifically, this case was transferred internally within the DeBry firm from George Waddoups to Mr. Wells to lessen the caseload of Mr. Waddoups because Mr. Waddoups' son had been diagnosed with cancer and was beginning cancer treatment (Transcript p. 10). Subsequently, Mr. Wells encountered difficulty with the Utah State Bar on an unrelated matter and was disbarred. The file was temporarily transferred to Dan Torrence, who was at the DeBry firm 1 - 2 months. The file was then transferred to Al

Gray while a new attorney was hired to help with Mr. Wells' caseload. Nancy Mismash appeared as counsel on March 26, 1997, five (5) days before the Motion for Summary Judgment was filed (R.174-175). Because of Mr. Waddoups' familiarity with this case, he resumed an active role in the case on or about April 9, 1997 (R.304-307). At the time of the hearing to continue the case, Mr. Waddoups had a trial scheduled for the same dates as the Brown trial (R.304-307).

VIII.

SUMMARY OF ARGUMENT

The trial court abused its discretion by granting summary judgment in this case. Prior to the hearing on Defendant's Motion for Summary Judgment Plaintiff filed a motion for continuance. The motion established a good cause basis to continue the trial. Despite this good cause, the trial court denied Plaintiff's motion to continue and granted Defendant's Motion for Summary Judgment. In so doing, it abused its discretion.

Simultaneously with the motion to continue, Plaintiff filed a motion to compel seeking answers to outstanding discovery. The trial court erroneously found that Plaintiff should have moved to compel discovery prior to Defendant filing for summary judgment. The court allowed Defendant to benefit from its abuse of the discovery process by granting its motion for summary judgment in light of the outstanding discovery. This

amounted to an abuse of discretion. In addition, the court denied Plaintiff's Rule 56(f) motion to continue using the same analysis.

Finally, the court committed reversible error by granting summary judgment in light of the outstanding discovery. By so doing, the court precluded Plaintiff from fully investigating her case and marshalling all the evidence necessary to oppose summary judgment.

IX.

ARGUMENT

A. As a Matter of Law The Trial Court Abused Its Discretion by Denying Plaintiff's Motion for Continuance.

On April 14, 1997 -- six (6) weeks before the trial was scheduled to start -- Plaintiff filed a motion requesting that the trial be continued. Plaintiff identified the following reasons for her request: 1) Defendant CHICK-FIL-A failed and refused to provide discover responses[1]; 2) Because Plaintiff did not have Defendant's discovery responses she was unable to fully investigate her claims; 3) Plaintiff's counsel was unexpectedly forced to withdraw from the case and was subsequently disbarred; and 4)

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[1]In addition to the Motion to Continue Trial and Vacate Scheduling Order, Plaintiff also filed a Motion to Compel Discovery seeking answers to her first set of interrogatories.

replacement counsel had a trial scheduled to begin on the same day as the trial in this case. Based on these reasons, the Court should have continued the trial as a matter of law.

Rule 40(b), Utah Rules of Civil Procedure provides:

> Upon motion of a party, the court may in its discretion, and upon such terms as may be just . . . postpone a trial or proceeding *upon good cause shown*. (Emphasis added).

In *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977) the defendant's counsel was unable to appear before the court on the scheduled trial date because of a previously scheduled court appearance. As such, defendant's counsel filed an objection seeking to have the trial date continued. The objection was never ruled on and the defendant did not appear for trial. The trial court entered a default judgment against defendant. The Utah Supreme Court reversed and remanded holding, "when counsel has made timely objections, given necessary notice, and has made a reasonable effort to have the trial date changed . . . it [is] an abuse of discretion not to grant a continuance." *Id.* at 376. See also: *Baeras v. Johnson*, 373 P.2d 375, 377 (Utah 1962) (despite two prior continuances, the trial court abused it discretion by denying the request for an additional continuance so the Plaintiff could be present at the trial).

Plaintiff herein made the necessary "good cause" showing to justify continuation

of the trial. She advised the trial court about the delays with discovery and her efforts to obtain the information from Defendant (R.301-303; Transcript pp. 7-9). Plaintiff also advised the Court that her attorney, Mr. Wells, was forced to withdraw and, because of his disbarment, was prevented from further representing or assisting her with this case. This unexpected change warranted additional time for replacement counsel to become fully advised of the case. Plaintiff's replacement counsel timely notified the Court of his inability to appear for trial on the scheduled dates due to a conflicting trial schedule (Transcript pp. 7, 10-11). These combined facts constitute "good cause" for continuation of the trial. As such, the trial court abused its discretion by not ruling on the motion for continuance prior to ruling on the Motion for Summary Judgment.

B. <u>As a Matter of Law the Trial Court Abused its Discretion by Rendering a Decision on Defendant's Motion for Summary Judgment</u>.

Plaintiff propounded interrogatories to Defendant on October 19, 1995 (R.19-21). Defendant answered these interrogatories on March 24, 1997 (R.168-173). The answers filed were incomplete and not responsive (R.238-234). One week later, on March 31, 1997, Defendant filed for summary judgment (R.218-219). In response, Plaintiff filed a Motion to Continue; Motion to Compel; Notices of Deposition; Rule 56(b) Motion to Stay; Affidavit of Nancy A. Mismash; and Memorandum in Opposition. Despite Plaintiff's outstanding motions, the trial court granted Defendant's Motion for Summary

Judgment. As a matter of law, the trial court abused its discretion by rendering a decision on Defendant's Motion for Summary Judgment in light of the pending motions.

Defendant had thirty (30) days to respond to Plaintiff's interrogatories. Rule 31, Utah Rules of Civil Procedure. In lieu of a response Defendant could have requested additional time to respond or sought a protective order. Rule 26(c), Utah Rules of Civil Procedure. Defendant did nothing. Upon inquiry from Plaintiff, Defendant agreed to provide the requested information. Again, Defendant did nothing. When Defendant finally responded to Plaintiff's interrogatories, the answers provided were incomplete and non-responsive. As such, Defendant did not meet its duty to respond to discovery.

At the hearing before the trial court, Defendant erroneously argued, and the trial court erroneously found, that Plaintiff had the duty to compel discovery from Defendant when answers were not received. Plaintiff argued that at no time was she advised that Defendant would not answer the interrogatories and, that if she had been so advised, she would have moved to compel. Within a few weeks of receiving Defendant's answers, Plaintiff filed a motion to compel seeking complete answers to her interrogatories.

Despite this pending motion[2], the Court proceeded to grant summary judgment in

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[2]Plaintiff's Motion to Compel was scheduled for hearing on May 5, 1997, the same date and time as Defendant's Motion for Summary Judgment (R.402-403; Transcript p. 52).

favor of Defendant holding, "the discovery requested could have been done well before the summary judgment motion was filed if Plaintiff had utilized the available discovery procedures." (R.450). This holding effectively sanctioned Plaintiff for failing to compel discovery earlier and rewarded Defendant for its misuse of this discovery process. This holding constitutes a clear abuse of discretion.

In *W.W. & W.B. Gardner v. Park West Village*, 568 P.2d 734 (Utah 1977) the Utah Supreme Court affirmed the trial court's entry of summary judgment against the defendant for defendant's failure to respond to discovery. The defendant appealed, arguing, as Defendant herein argued, that "plaintiff cannot complain, since plaintiff did not move pursuant to Rule 37[(a)(2)] for an order compelling defendant to answer interrogatories." *Id.* at 738. The *Gardner* court rejected this argument and held:

> Defendant may not ignore with impunity the requirements of Rules 33 and 34, and the necessity to respond within thirty (30) days, or to request additional time or to seek a protective order under Rule 26(c). A party to an action has a right to have the benefits of discovery procedure promptly, not only in order that he may prepare his case, but also in order to bring light to facts which may entitle him to summary judgment.

Id. at 738.

Further, it is well settled that summary judgment should not be granted if

discovery is incomplete since information sought in discovery may create genuine issues of material fact sufficient to defeat the motion. *Downtown Athletic Club v. Horman*, 740 P.2d 275, 277 (Utah App. 1987) citing *Auerbach's, Inc. v. Kimball*, 572 P.2d 376, 377 (Utah 1977).

In *Auerbach's* defendant moved for summary judgment on plaintiff's counter-claim. At the time of the summary judgment hearing defendant had not responded to plaintiff's discovery and plaintiff timely filed a motion to strike the hearing because of this deficiency. The trial court proceeded with the hearing and granted defendant's motion. Plaintiff appealed. In reversing the trial court, the Utah Supreme court reasoned:

> The granting of the motion for summary judgment was premature because [plaintiff's] discovery was not then complete. It was the information sought in the proceedings for discovery, which [plaintiff] claimed would infuse the issue with facts sufficient to defeat a motion for summary judgment, and sustain his counter-claim.

Id. at 377

The court went on to hold:

> When a motion is made opposing summary judgment on the grounds discovery has *not* been completed, *the court should grant a continuance or deny the motion for summary judgment.* (Emphasis added).

Id. at 377

In this case, Plaintiff received Defendant's answers to interrogatories one we before receiving Defendant's Motion for Summary Judgment. Upon receipt Defendant's answers Plaintiff learned, for the first time, that Defendant was not going provide the names, addresses, telephone numbers, etc. of the CHICK-FIL-A employee despite Defendant's previous representations that this information would be provided Plaintiff timely filed a Motion to Compel and responded to Defendant's Motion fo Summary Judgment with a memorandum in opposition and Rule 56(f) affidavit requestin additional discovery. Plaintiff also noticed a deposition for each employee identifie Said depositions were scheduled to occur before the trial date.

Defendant's delay in answering interrogatories prevented Plaintiff from fulli investigation her claim and ultimately precluded the discovery of facts and witn material to the opposition of summary judgment and to Plaintiff's presentation of case. And, it was not only Plaintiff's interrogatories that were ignored by Defendan Defendant further frustrated the discovery process by its failure to fully respond to trial court's scheduling order (Transcript p. 11). Specifically, Defendant did not ide its witnesses with particularity but rather identified them generically i.e., Hahn Prope Personnel, Fashion Place Mall security personnel, and CHICK-FIL-A personnel (R.

137) thereby denying Plaintiff of the names and identity of fact witnesses necessary to support her claims.

The trial court got things backwards. It should have focused its attention on Defendant's inactions and asked what Defendant had done to comply with the rules rather than what Plaintiff had done. Further, the trial court should not have allowed Defendant's failure to comply with discovery to be used to Defendant's advantage in support of its Motion For Summary Judgment. Under these facts, the trial court should have deferred the hearing on Defendant's Motion for Summary Judgment until discovery was complete. As such, the trial court abused its discretion by finding that the Plaintiff "could have" compelled Defendant's answers earlier and thereafter ruling on Defendant's Motion for Summary Judgment.

C. The Trial Court Abused its Discretion by Denying Plaintiff's Rule 56(f) Motion to Continue.

As is argued above, Plaintiff timely commenced discovery in this case. Her discovery efforts were severely frustrated by Defendant's failure to timely produce answers. Upon receipt of Defendant's Motion for Summary Judgment, Plaintiff timely filed her opposition along with a Rule 56(f) motion to continue and supporting affidavit (R.393-396). This affidavit sets forth the specific facts Plaintiff expected to discover.

These facts were the exclusive control of Defendant and were material to Plaintiff' theory of the case. As such, the trial court abused its discretion by denying Plaintiff' Rule 56(f) motion to continue.

In *Cox v. Winters*, 678 P.2d 311 (Utah 1984) the Utah Supreme Court set fortl the criteria for a continuance pursuant to Rule 56(f). The first consideration is was there sufficient discovery prior to the motion for summary judgment and, if so, was it afforded an appropriate response. *Id.* at 313. And, second, was the discovery sought by the party opposing summary judgment for purely speculative facts after substantial discovery. *Id.* at 314. See also: *Downtown Athletic Club* at 278.

In *Cox* the court found that plaintiff had commenced discovery prior to the filing of the motion for summary judgment and that these efforts were "precluded by reason of defendant's failure to respond." *Id.* at 314. They also found that the outstanding discovery dealt with the very issues raised in the motion for summary judgment. As such the court reversed the trial courts grant of summary judgment.

Cox is squarely on point with the facts presented in this case. Specifically, one plaintiff's theories of recovery was that by distributing greasy chicken in a busy mall concourse, defendant engaged in a method of operation whereby the foreseeable acts of third parties, i.e. dropping chicken on the floor created a dangerous condition. (R.1[illegible]

In order to advance this theory, Plaintiff needed to talk with the employees of CHICK-FIL-A and learn:

a. The skill of the employees serving the chicken;

b. The policies and procedures actually in place for handing out chicken samples;

c. The method for handing out chicken samples, specifically: how often the servers went over the lease line into the mall common area; how often the area was cleaned; how far into the mall the cleaning extended; how the chicken was prepared; how large the pieces were cut; how often chicken was dropped on the floor; who was served chicken;

d. The substance of the lease agreement between Defendant Hahn and Defendant CHICK-FIL-A;

e. Whether warnings were issued from Defendant Hahn to Defendant CHICK-FIL-A regarding Defendant Chick-Fil-A's activity within the mall common area;

f. Defendant Hahn Management's responsibilities for the care and upkeep of the mall common area, including any cleaning records;

g. The sum and substance of any discussions between Defendant Hahn and

Defendant CHICK-FIL-A regarding Plaintiff and the accident in question; and,

h. The sum and substance of any accident reports for the years 1990 through present.

Affidavit of Nancy A. Mismash (R.393-396).

Because Defendant did not comply with Plaintiff's discovery request as set forth above, Plaintiff was unable to fully investigate this claim and, plaintiff was ultimately unable to present the trial court with the facts necessary to withstand summary judgment. Accordingly Plaintiff timely filed for her Rule 56(f) motion to continue along with supporting affidavit setting forth the additional discovery sought.

Given that Defendant had already failed to comply with discovery, the trial Court abused its discretion by denying Plaintiff's Rule 56(f) motion to allow further discovery before ruling on Defendant's Motion for Summary Judgment.

D. Utah Case Law Requires That Discovery be Completed Before Summary Judgment Can be Rendered.

In opposing Defendant's Motion for Summary Judgment, Plaintiff presented the trial court with a number of issues of material fact that would have precluded summary judgment: i.e., how far away from the CHICK-FIL-A restaurant was Plaintiff when she

fell; what caused her to fall; did the employees of CHICK-FIL-A negligently distribute chicken samples in the mall walkway; did CHICK-FIL-A knowingly create a danger by offering chicken samples when the mall was crowded; did CHICK-FIL-A anticipate pieces of chicken and toothpicks might be dropped or thrown on the floor in the mall walkway; did CHICK-FIL-A receive complaints about their sampling practice, and if so, what action was taken. The trial court erroneously concluded that the claims presented by Plaintiff were no different that those denied as a matter of law in *Schnuphase v. Storehouse Markets*, 918 P. 2d 476 (Utah 1996) and granted Defendant's Motion for Summary Judgment.

It is well recognized that issues of negligence ordinarily present questions of fact to be resolved by the fact-finder. *FMA Acceptance Co. v. Leatherby Ins. Co.*, 594 P.2d 1332 (Utah 1979). Summary judgement in negligence actions is only appropriate in the most clear cut cases. *Ingram v. Salt Lake City*, 733 P.2d 12 (Utah 1987).

The Utah Supreme Court has stated its position on the importance of trial by jury. In *Webb v. Olin Mathison*, 342 P.2d 1094 (Utah 1959), the court held:

> . . . It is the declared policy of this court to zealously protect the right of trial by jury and not to take issues from them and rule as a matter of law except in clear cases.

The Utah Supreme Court has also set forth the following standard to be applied

in evaluating a motion for summary judgement:

> Summary judgement is proper only if the pleadings, deposition, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to judgement as a matter of law. If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all the evidence and all the reasonable inferences fairly drawn from the evidence in a light favorable to the party opposing summary judgement.

Bowen v. Riverton City, 656 P.2d 436 (Utah 1982).

The Supreme Court has characterized summary judgment as a "harsh measure" and requires that the contentions of the party opposing summary judgement be considered in a light most advantageous to them with all doubts resolved in favor of permitting trial. *W.W. & W.B. Gardner, Inc. v. Mann,* 680 P.2d 23, 24 (Utah 1984). In applying these standards for summary judgment, all of the evidence, inferences, and implications must be given to the party opposing the motion for summary judgment and all the benefits must be resolved in the non-moving party's favor.

The pinnacle argument presented to the trial court was whether or not Defendant's method of operation, i.e. offering samples of greasy chicken in the mall concourse, created a dangerous condition such that Plaintiff need not prove actual or constructive notice of the condition (R.342; Transcript p. 44-45). Specifically, Plaintiff argued that the activities of Defendant in this case were more akin the activities of the defendant in

Canfield v. Albertsons, 841 P. 2d 1224 (Utah App. 1996) than those of the defendant in *Schnuphase* (R.342). In order to advance this theory, Plaintiff needed to talk with the CHICK-FIL-A employees that actually distributed the chicken to the mall patrons. Plaintiff was precluded from furthering this theory because of Defendant's failure and refusal to fully cooperate in discovery as argued above.

In a recent Utah case, *Drysdale v. Ford Motor Co.*, 947 P. 2d 678 (Utah 1997), the Supreme Court reversed the trail court's grant of summary judgment. The *Drysdale* court held:

> Litigants must be able to present their cases *fully* to the court before judgment can be rendered against them . . . *prior to the completion of discover, however, it is often difficult to ascertain whether the non-moving party will be able to sustain its claim*. In such case, summary judgment should generally be denied. (Emphasis added).

Id. at 680.

As in *Drysdale*, Plaintiff was denied the opportunity to complete discovery. Specifically, she was precluded from establishing that the method of operation used by Defendant created a dangerous condition. Because Plaintiff was denied this opportunity to fully present her case, summary judgement was improper and should be reversed as a matter of law.

X.

CONCLUSION

In this case, had Defendant provided Plaintiff with answers to interrogatories Plaintiff would have been able to fully investigate her claims and oppose the motion for summary judgment. Given the outstanding discovery, the trial court abused its discretion by granting Defendant's Motion for Summary Judgment without considering any of Plaintiff's pending motions.

Notwithstanding the inadequacy of Defendant's discovery responses, Plaintiff presented the trial court with disputed issues of material fact, as well as a viable theory of recovery. Given the general preference to have negligence cases go before a jury, the trial court committed reversible error by granting Defendant's Motion for Summary Judgment.

Plaintiff requests that this case be reversed and remanded so that she may present her case to the trier of fact.

DATED this 8th day of July, 1998.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Appellant

By: _____
NANCY A. MISMASH

ADDENDUM

XI.

ADDENDUM

JOHN R. LUND (A4368)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendants
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

CATHERINE BROWN,

Plaintiff,

vs.

CHRIS GLOVER, d/b/a CHICK-FIL-A, INC. of FASHION PLACE, HAHN PROPERTY MANAGEMENT CORPORATION, a California corporation d/b/a HAHN COMPANY,

Defendants.

SUMMARY JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

Civil No. 950905823 PI

Judge William B. Bohling

This matter came before the Court for hearing on May 5, 1997. Plaintiff was present and represented by Mr. George T. Waddoups and Ms. Nancy A. Mismash of Robert J. DeBry & Associates. Defendants were represented by Mr. John R. Lund and Mr. Scott K. Wilson of Snow, Christensen & Martineau. Arguments were presented regarding the following motions, all of which had been fully briefed prior to the hearing:

1. Defendants' Motion for Summary Judgment

2. Plaintiff's Motion to Continue Trial and Vacate Scheduling Order

3. Plaintiff's Rule 56(f) Motion to Stay Decision

The court now being fully advised, and good cause appearing therefore, now enters the following judgment and order:

1. Plaintiff's Rule 56(f) Motion to Stay Decision is denied, for the reasons and on the grounds set forth in the record, including that the discovery requested could have been done well before the summary judgment motion was filed, if plaintiff had utilized the available discovery procedures, and that the information sought is not material to grounds for defendants' Motion for Summary Judgment.

2. Defendants' Motion for Summary Judgment is granted for the reasons and on the grounds set forth in the record, including the absence of any meaningful distinction between the claims presented in this case and the claims that were denied as a matter of law in *Schnuphase v. Storehouse Markets*, 918 P.2d 476 (Utah 1996), *Long v. Smith Food King Store*, 531 P.2d 360 (Utah 1973), and *Allen v. Federated Dairy Farms, Inc.*, 538 P.2d 175 (Utah 1975).

3. Plaintiff's Motion to Continue Trial and Vacate Scheduling Order is deemed moot by the Court's granting of summary judgment and it is therefore not decided.

4. Judgment is entered in favor of defendants and against plaintiff and plaintiff's action is dismissed with prejudice.

DATED this 22 day of July, 1997.

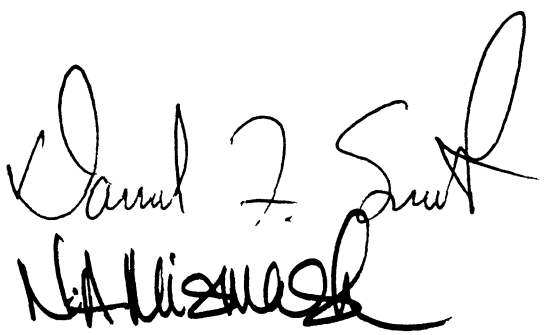
BY THE COURT:

By _____
William B. Bohling, District Court Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing APPELLANT'S BRIEF (Brown vs. Chris Glover, et al.) was mailed, postage prepaid, this 8th day of July, 1998 to the following:

John R. Lund
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145



APPROVED AS TO FORM:

ROBERT J. DEBRY & ASSOCIATES

By _____
George T. Waddoups
Nancy A. Mismash

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UTAH RULES OF CIVIL PROCEDURE
PART VI. TRIALS

RULE 40 ASSIGNMENT OF CASES FOR TRIAL; CONTINUANCE

(a) Order and Precedence. The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts may deem expedient. Precedence shall be given to actions entitled thereto by statute.

(b) Postponement of the Trial. Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

(c) Taking Testimony of Witnesses Present. If required by the adverse party, the court shall, as a condition to such postponement, proceed to have the testimony of any witness present taken, in the same manner as if at the trial; and the testimony so taken may be read on the trial with the same effect, and subject to the same objections that may be made with respect to a deposition under the provisions of Rule 32(c)(1) and (2) [Rule 32(c)(3)(A) and (B)].

UTAH RULES OF CIVIL PROCEDURE
PART VII. JUDGMENT

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

DOUGLAS B. JAMES,

Defendants/Appellant.

Case Type: APPEAL

Priority No. 2

Case No. 970544-CA

BRIEF OF APPELLEE

AN APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
STATE OF UTAH, COUNTY OF CACHE
THE HONORABLE BURTON H. HARRIS PRESIDING

Tony C. Baird, #7030
Deputy Cache County Attorney
11 West First North
Logan, UT 84321
Telephone: (435) 752-8920
Attorney for Appellee

). BRUCE OLIVER, #5120
ttorney at Law
30 South 300 West, Suite 210
alt Lake City, UT 84101-1490
elephone: (801) 328-8888
ttorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULES:

STATUTES:

COMES NOW the Plaintiff, by its attorney, Tony C. Baird, Deputy Cache County Attorney, and tenders its Brief in this appeal pursuant to *Rule 24 U.R.A.P.* as follows:

JURISDICTION OF THE APPELLATE COURT

The Utah Court of Appeals has jurisdiction of this matter pursuant to *U.C.A. §78-2a-3(2)(d) and (f), (1953 as amended)*. Pursuant to *Rule 4 U.R.A.P.* the Court has transferred this appeal to the Utah Court of Appeals.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

First Issue: Whether Trooper Kendrick had reasonable suspicion to detain the Defendant.

Second Issue: Whether Trooper Kendrick lawfully opened the Defendant's car door to make contact with the Defendant.

Third Issue: Whether the Defendant was properly arrested by Trooper Kendrick.

STANDARD OF REVIEW

This Court reviews the factual findings underlying a trial court's ruling on a motion to suppress under a clearly erroneous standard; State v. Patefield, 927 P.2d 655, 657 (Utah Ct. App. 1996); and reviews the trial court's conclusions based on the totality of those facts for correctness. Id.

A trial court's findings of fact in a criminal bench trial are reviewed under the clearly erroneous standard. See State v. Goodman, 763 P.2d 786, 787 n.2 (Utah 1988). A trial court's finding is clearly erroneous when it is against the clear weight of the evidence or,

although there is evidence to support it, the court reviewing all the record evidence is left with a definite and firm conviction that a mistake has been made. State v. Pena, 869 P.2d 932, 935 (Utah 1994).

A trial court's conclusions of law in criminal cases are reviewed for correctness. State v. Pena, 869 P.2d 932, 935, 939 (Utah 1994), State v. Thurman, 846 P.2d 1256, 1271 (Utah 1993). The appellate court decides the matter for itself and does not defer in any degree to the trial court's determination of law. Pena, 869 P.2d at 936.

GOVERNING STATUTES

A copy of the following statute cited herein is included in the Addendum to this Brief:

Utah Code Annotated, §41-6-44, (1953 as amended)

STATEMENT OF RELEVANT FACTS

1. While parked on the shoulder of the highway during the course of a traffic stop, Trooper Kendrick of the Utah Highway Patrol was approached by a concerned citizen. (R. at 13). The citizen pulled up behind the trooper's patrol car in a blue Dodge Caravan. He got out of his car, walked up to the Trooper and reported that he had just observed another car driving all over the roadway, and that this car had (either) struck (or) almost struck three vehicles. (R. at 32-33). The citizen identified the car's license plate number, make, color and direction of travel. (R. at 32).

2 With this information, Trooper Kendrick ran the license plate number with dispatch and obtained the registered address. (R. at 24, 35). He proceeded to this address and

while nearing the location observed the suspect vehicle, a pickup truck, pulling into the driveway. (R. at 35-36). He exited his patrol car, now parked behind the pickup, and approached on the driver's side.

3. Trooper Kendrick knocked on the driver's side window to try and make contact with the occupants, the Defendant and his significant other. (R. at 50). After a moment of no response, Trooper Kendrick opened the door to speak with the Defendant, the driver. (R. at 51). Trooper Kendrick immediately noticed the odor of alcohol and other signs of alcohol consumption on the Defendant. He also observed an open twelve pack of beer inside the pickup. (R. at 56).

4. The Defendant was invited out of the pickup. The passenger also exited the pickup and began to confront Trooper Kendrick. Trooper Kendrick decided to call for backup. He instructed the Defendant to remain and he would be right back. (R. at 60). After returning from calling for backup, Trooper Kendrick discovered that the Defendant had left the scene and gone inside the house. (R. at 63).

5. Momentarily, backup arrived, and Trooper Kendrick again initiated contact with the Defendant by approaching the door to the living area of the residence inside the garage. By speaking through the doorway, Trooper Kendrick told the Defendant he could either come out of the house or he was going to come in to continue his investigation. The Defendant then came out of the house on his own accord. (R. at 63-64).

6. The Defendant consented to one field sobriety test. Afterwards, he refused any further tests. He was arrested and subsequently convicted of driving under the influence.

SUMMARY OF ARGUMENT

Trooper Kendrick properly acted on information he received by a citizen informant and upon his own observations when he approached and subsequently arrested the defendant. The approach and detention of the Defendant were firmly based on articulable reasonable suspicion that the defendant had violated traffic laws and was driving while under the influence. Further, Trooper Kendrick was justified in re-contacting the Defendant at his home in order to continue his investigation. The defendant's conviction should be upheld.

ARGUMENT

First Issue: Whether Trooper Kendrick had reasonable suspicion to detain the Defendant.

The Defendant argues that Trooper Kendrick lacked reasonable suspicion to detain him. The State agrees that the Defendant was detained, that a level two stop occurred; however, the State believes, and the record supports, that Trooper Kendrick had reasonable suspicion sufficient to detain the Defendant for investigation.

"[R]easonable suspicion exists if the officer has a 'reasonable suspicion based on objective facts, that the individual is involved in criminal activity.' In determining the existence of reasonable suspicion, the court must look to the totality of the circumstances." State v. Nguyen, 878 P.2d 1183, 1186 (Utah App. 1994). "[T]he conduct observed and/*or information relied upon* ... must suggest to the officer, in that officer's experience, that criminal activity may be at foot." Id (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)) (emphasis added).

With regard to vehicle stops, the Utah Supreme Court has said: "[A]s long as an officer suspects that the 'driver is violating any one of the multitude of applicable traffic and

equipment regulations,' the police may legally stop the vehicle." State v. Lopez, 873 P.2d 1132, (Utah 1994)(citations omitted). The investigating officer may rely upon his own observations and/or other sources of information to form reasonable suspicion for a stop. In cases where reasonable suspicion is primarily based upon a citizen informant's tip the stop is proper if the information is (1) reliable, (2) provides sufficient detail of criminal activity and (3) is confirmed by the investigating officer. See Kaysville City v. Mulcahy, 943 P.2d 231 (Utah Ct. App. 1997). A tip from an identified citizen informant is extremely reliable. City of St. George v. Carter, 325 Utah Adv. Rep. 15, 17 (Utah Ct. App. 1997). The information provided by the citizen informant should provide enough detail about criminal activity to support reasonable suspicion (e.g. illegal activity observed, description of vehicle, license number, and location of incident). Id. To confirm a citizen informant's tip, the officer need not actually observe the reported behavior; it is sufficient, for example, that he verifies the suspect car's description and location within a reasonable time of the tip. Id.

In the present case, (1) Trooper Kendrick relied upon the eye witness report of a citizen informant, an extremely reliable source of information. The citizen appeared to be motivated out of community concern, going out of his way to stop and contact Trooper Kendrick while he was parked on the side of the highway.

(2) The citizen provided detailed information regarding the incident. One, he described the Defendant's driving pattern, how the car was driving all over the roadway and had (either) struck (or) almost struck three vehicles. Two, he provided a description of the vehicle, including the type and make. Three, he provided the license plate number to the Defendant's vehicle. And, four, he indicated the approximate location and direction of travel of the vehicle.

(3) Trooper Kendrick also confirmed the citizen's information by locating the Defendant's vehicle, as described by the citizen, shortly after the tip, just as it was pulling into the Defendant's driveway.

This information supports a reasonable basis to believe that the Defendant had committed or was in the process of committing a traffic offense (e.g., improper lane travel, reckless driving or driving while under the influence). Therefore, Trooper Kendrick had sufficient facts wherein he could conclude, and articulate, reasonable suspicion in order to stop and/or detain the Defendant for further investigation. The Defendant was properly approached and detained by Trooper Kendrick.

Second Issue: Whether Trooper Kendrick was justified in opening the Defendant's car door to make contact with the Defendant.

The Defendant also argues that Trooper Kendrick performed an illegal search by opening the driver's side door of the Defendant's pickup. Presumably, this would mean that the Defendant's arrest was improper as it flowed from the fruit of the poisonous tree. The State refutes this argument on two grounds. First, the State argues that Trooper Kendrick's actions were part of a legitimate investigative detention and need only be supported by reasonable suspicion. See Terry v. Ohio, 392 U.S. 1, 22-23 (1968)(police officer may, when supported by reasonable suspicion, approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest); United States v. Hensley, 469 U.S. 221, 227 (1985)(if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was or is involved in criminal activity then a Terry stop may be made to investigate that suspicion). As discussed above,

Trooper Kendrick

had sufficient facts wherein he could conclude, and articulate, reasonable suspicion in order to approach and/or detain the Defendant for further investigation. With this, he approached the Defendant's pickup, knocked on the window, waited, received no response, and then opened the door with the sole purpose to contact the Defendant to investigate the citizen informant's complaint. (R. at 50, lines 18 through 25.) Trooper Kendrick's actions, therefore, were justified and should be upheld as part of a legitimate investigative detention.

Second, even if this Court finds that Trooper Kendrick's actions were a search and not part of a legitimate investigative detention, this Court should still uphold the Defendant's arrest and conviction, as any evidence that was obtained as a result of Trooper Kendrick opening the door would have been ultimately or inevitably discovered by lawful means. See Nix v. Williams, 467 U.S. 431, 444 (1984) (inevitable discovery rule allows the admission of evidence if the information ultimately and inevitably would have been discovered by lawful means). As aforementioned, Trooper Kendrick had reasonable suspicion to detain the Defendant for investigation. His intent was to speak with the Defendant about the complaint. Inevitably, Trooper Kendrick would have made personal contact with the Defendant and detected the odor of alcoholic beverage coming from his person and observed the other signs of alcohol consumption on the Defendant. The Defendant was at his residence and preparing to get out of the truck to enter the home -- presumably, the Defendant was not going to spend the night in the pickup and would have exited shortly. When the Defendant exited the pickup, Trooper Kendrick would be there to make the same observations as when he opened the door.

Under either of these grounds the State believes Trooper Kendrick's actions did not

taint the Defendant's arrest and believes this Court should uphold the same.

Third Issue: Whether Trooper Kendrick properly re-contacted the Defendant at his home.

The Defendant next asserts that Trooper Kendrick conducted an unreasonable warrantless search or seizure of the defendant in violation of Article I, section 14 of the Utah State Constitution when he re-contacted the defendant at his home. Presumably, this would mean that the Defendant's arrest was improper as it flowed from the fruit of the poisonous tree. The facts in this case do not support such a conclusion.

Firstly, there never was an entry into the home; the officers merely approached the home's entrance at the garage and spoke to the Defendant through the door. Granted, the Defendant was told by Trooper Kendrick that he would enter the home if the Defendant did not come out but, as the situation fleshed out, neither Trooper Kendrick nor any other officer entered the home. The Defendant came out on his own accord and subjected himself to further investigation by Trooper Kendrick. Therefore, there was not a warrantless entry into the Defendant's home and the Defendant's arrest was proper.

Secondly, even if this Court finds that Trooper Kendrick entered the Defendant's home when he stood in the garage at the door entering the living area, this Court should still uphold the Defendant's arrest. The actions of the officer were fully justified. Trooper Kendrick had the authority to detain the defendant based on the facts heretofore discussed. "[W]here a police officer observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity may be afoot, a brief stop and detention is justified." Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct 1868, 1884, 20 L.Ed. 2d 889 (1968). The defendant disobeyed the officer's order to remain thereby creating the need for the officer to re-contact him. A suspect cannot openly thumb his nose at an investigating officer by

disobeying his order, entering his home and then feigning constitutional protections. To uphold such logic would frustrate legitimate law enforcement investigations and encourage dangerous conduct by detainees. See, e.g., U.C.A. § 44-6-13.5("Failure to respond to officer's signal to stop") and U.C.A. § 76-8-305 ("Interference with arresting officer").

Thirdly, the officer's entry was justified under the "exigent circumstances" exception to the warrant requirement. An officer may enter a home without a warrant when he has probable cause and an exigent circumstance exists. See State v. Beavers, 859 P.2d 9, 15-16 (Utah Ct. App. 1993). In the present case, Trooper Kendrick had probable cause to believe that the Defendant had committed the offense of driving while under the influence. (1) He had received reliable information from a citizen informant of the Defendant's driving pattern -- swerving on the roadway and nearly striking three vehicles -- and confirmed that indeed the Defendant was driving the pickup. (2) In the Defendant's pickup, he observed an open twelve pack of beer. (3) He also observed the strong odor of alcoholic beverage coming from the pickup and the Defendant's person. (4) He noticed that the Defendant's speech was slurred, face flaccid and ptosis of the eyes. (R. at 56-57). (5) The Defendant was somewhat clumsy and dropped his wallet and other papers. (R. at 57). (6) The Defendant admitted to drinking alcohol. (R. at 59). (7) The Defendant attempted to avoid any further questioning or investigation by Trooper Kendrick. (R. at 60-65). And, (8) the Defendant appeared unstable on his feet. (R. at 61).

Further, in the present case, an exigent circumstance existed. "Exigent circumstances are those 'that would cause a reasonable person to believe that entry...was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law

enforcement efforts.'" Beavers, 859 P.2d at 18.

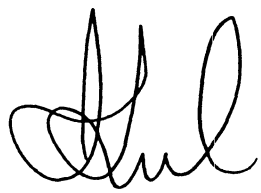
This case satisfies several of the factual scenario of exigent circumstances proposed by Beavers. 1) Preservation of Evidence: Alcohol dissipates from the body over time; it is crucial to perform relevant tests shortly after the stop. 2) Escape of Suspect: The defendant left the scene after being told by the officer to "stay put." 3) Frustration of Law Enforcement Efforts: The defendant's departure from the scene after being ordered to stay violates U.C.A § 76-8-305, ("Interference with an arresting officer").

Therefore, because Trooper Kendrick entered the home under the exigent circumstances exception to the warrant requirement, the Defendant's arrest was proper.

CONCLUSION

Officer Kendrick properly acted on information he received by a citizen informant and upon his own observations when he approached and subsequently arrested the defendant. The approach and detention of the Defendant were firmly based on articulable reasonable suspicion that the defendant had violated traffic laws and was driving while under the influence. Further, Trooper Kendrick was justified in re-contacting the Defendant at his home in order to continue his investigation. The defendant's conviction should be upheld.

DATED this 30 day of June, 1998.



Tony C. Baird

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct original and eight copies of the foregoing BRIEF OF APPELLEES, to the Utah Court of Appeals and two copies postage prepaid, this 30 day of June, 1998, to the following:

D. BRUCE OLIVER, #5120
Attorney for Appellant
180 South 300 West, Suite 210
Salt Lake City, UT 84101-1490

Tony C. Baird

ADDENDUM:

A.

Utah Code § **41-6-44**

WEST'S UTAH CODE
TITLE 41. MOTOR VEHICLES
CHAPTER 6. TRAFFIC RULES AND REGULATIONS
ARTICLE 5. DRIVING WHILE INTOXICATED AND RECKLESS DRIVING

Current through End of 1997 General and 1st and 2nd Sp. Sess

§ 41-6-44. Driving under the influence of alcohol, drugs, or with specified or unsafe blood alcohol concentration--Measurement of blood or breath alcohol--Criminal punishment--Arrest without warrant--Penalties--Suspension or revocation of license

(1) As used in this section:

(a) "prior conviction" means any conviction for a violation of:

(i) this section;

(ii) alcohol-related reckless driving under Subsections (9) and (10);

(iii) local ordinances similar to this section or alcohol-related reckless driving adopted in compliance with Section 41-6-43;

(iv) automobile homicide under Section 76-5-207; or

(v) statutes or ordinances in effect in any other state, the United States, or any district, possession, or territory of the United States which would constitute a violation of this section or alcohol-related reckless driving if committed in this state, including punishments administered under 10 U.S.C. 815;

(b) a violation of this section includes a violation under a local ordinance similar to this section adopted in compliance with Section 41-6-43; and

(c) the standard of negligence is that of simple negligence, the failure to exercise that degree of care that an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(2)(a) A person may not operate or be in actual physical control of a vehicle within this state if the person:

(i) has a blood or breath alcohol concentration of.08 grams or greater as shown by a chemical test given within two hours after the alleged operation or physical control; or

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(c) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

***11516** (3) A person convicted the first or second time of a violation of Subsection (2) is guilty of a:

(a) class B misdemeanor; or

(b) class A misdemeanor if the person:

(i) has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner; or

(ii) had a passenger under 16 years of age in the vehicle at the time of the offense.

(4)(a) As part of any sentence imposed the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to work in a community-service work program for not less than 24 hours.

(c) In addition to the jail sentence or community-service work program, the court shall:

(i) order the person to participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility, as appropriate; and

(ii) impose a fine of not less than $700.

(d) For a violation committed after July 1, 1993, he court may order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility if the licensed alcohol or drug dependency rehabilitation facility determines that the person has a problem condition involving alcohol or drugs.

(5)(a) If a person is convicted under Subsection (2) within six years of a prior conviction under this section, the court shall as part of any sentence impose a mandatory jail sentence of not less than 240 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to work in a community-service work program for not less than 80 hours.

(c) In addition to the jail sentence or community-service work program, the court shall:

(i) order the person to participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility, as appropriate; and

(ii) impose a fine of not less than $800.

(d) The court may order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility.

(6)(a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a:

(i) class A misdemeanor except as provided in Subsection (ii); and

(ii) third degree felony if at least:

(A) three prior convictions are for violations committed after April 23, 1990; or

***11517** (B) two prior convictions are for violations committed after July 1, 1996.

(b)(i) Under Subsection (a)(i) the court shall as part of any sentence impose a fine of not less than $2,000 and impose a mandatory jail sentence of not less than 720 hours.

(ii) The court may, as an alternative to all or part of a jail sentence, require the person to work in a community-service work program for not less than 240 hours, but only if the court enters in writing on the record the reason it finds the defendant should not serve the jail sentence. Enrollment in and completion of an alcohol or drug dependency rehabilitation program approved by the court may be a sentencing alternative to incarceration or community service if the program provides intensive care or inpatient treatment and long-term closely supervised follow-through after the treatment.

(iii) In addition to the jail sentence or community-service work program, the court shall order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility.

(c) Under Subsection (a)(ii) if the court suspends the execution of a prison sentence and places the defendant on probation the court shall impose:

(i) a fine of not less than $1,500;

(ii) a mandatory jail sentence of not less than 1,000 hours; and

(iii) an order requiring the person to obtain treatment at an alcohol or drug dependency rehabilitation program providing intensive care or inpatient treatment and long-term closely supervised follow-through after treatment.

(7)(a) The mandatory portion of any sentence required under this section may not be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation under this section may not be terminated.

(b) The department may not reinstate any license suspended or revoked as a result of the conviction under this section, until the convicted person has furnished evidence satisfactory to the department that:

(i) all required alcohol or drug dependency assessment, education, treatment, and rehabilitation ordered for a violation committed after July 1, 1993, have been completed;

(ii) all fines and fees including fees for restitution and rehabilitation costs assessed against the person have been paid, if the conviction is a second or subsequent conviction for a violation committed within six years of a prior violation; and

***11518** (iii) the person does not use drugs in any abusive or illegal manner as certified by a licensed alcohol or drug dependency rehabilitation facility, if the conviction is for a third or subsequent conviction for a violation committed within six years of two prior violations committed after July 1, 1993.

(8)(a)(i) The provisions in Subsections (4), (5), and (6) that require a sentencing court to order a convicted person to: participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility; obtain, in the discretion of the court, treatment at an alcohol or drug dependency rehabilitation facility; obtain, mandatorily, treatment at an alcohol or drug dependency rehabilitation facility; or do a combination of those things, apply to a conviction for a violation of Section 41-6-44.6 or 41-6-45 under Subsection (9).

(ii) The court shall render the same order regarding education or treatment at an alcohol or drug dependency rehabilitation facility, or both, in connection with a first, second, or subsequent conviction under Section 41-6-44.6 or 41-6-45 under Subsection (9), as the court would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections (4), (5), and (6).

(b) Any alcohol or drug dependency rehabilitation program and any community-based or other education program provided for in this section shall be approved by the Department of Human Services.

(9)(a)(i) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45, of an ordinance enacted under Section 41-6-43, or of 41-6-44.6 in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation.

(ii) The statement is an offer of proof of the facts that shows whether there was consumption of alcohol, drugs, or a combination of both, by the defendant, in connection with the violation.

(b) The court shall advise the defendant before accepting the plea offered under this subsection of the consequences of a violation of Section 41-6-44.6 or of 41-6-45.

(c) The court shall notify the department of each conviction of Section 41-6-44.6 or 41-6-45 entered under this subsection.

(10) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

***11519** (11)(a) The Department of Public Safety shall:

(i) suspend for 90 days the operator's license of a person convicted for the first time under subsection (2);

(ii) revoke for one year the license of a person convicted of any subsequent offense under subsection (2) if the violation is committed within a period of six years from the date of the prior violation; and

(iii) suspend or revoke the license of a person as ordered by the court under Subsection (12).

(b) The department shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 53-3-223, if the previous suspension was based on the same occurrence upon which the record of conviction is based.

(12)(a) In addition to any other penalties provided in this section, a court may order the operator's license of a person who is convicted of a violation of Subsection (2) to be suspended or revoked for an additional period of 90 days, 180 days, or one year to remove from the highways those persons who have shown they are safety hazards.

(b) If the court suspends or revokes the person's license under this subsection, the court shall prepare and send to the Driver License Division of the Department of Public Safety an order to suspend or revoke that person's driving privileges for a specified period of time.

Amended by Laws 1994, c. 159; Laws 1994, c. 263; Laws 1996, c. 71, § 1, eff. July 1, 1996; Laws 1996, c. 220, § 1, eff. July 1, 1996; Laws 1996, c. 223, § 2, eff. July 1, 1996; Laws 1997, c. 68, § 1, eff. May 5, 1997.

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Section 3 of Laws 1996, c. 220, provides:

"If this bill and S.B. 4 [Laws 1996, c. 71], DUI Amendments, both pass, it is the intent of the Legislature that the amendments in Subsection 41-6-44(6) in this bill supersede the amendments to Subsections 41-6-44(6) and (7) in S.B. 4."

Section 5(1) of Laws 1996, c. 223, provides:

"If this bill and H.B. 3 [Laws 1996, c. 220], Driving Under the Influence Penalty Enhancement, both pass, it is the intent of the Legislature that the amendments to Subsection 41-6-44(6) in H.B. 3 supersede the amendments to Subsection 41-6-44(6)(a), (6)(b), and (7) in this bill."

Search this disc for cases citing this section.